No. 86-1336

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

FRANK MCCOY, EDWARD ERDELATZ and PIERRE MERLE,
Petitioners,

vs.

THE HEARST CORPORATION, A California Corporation,
SAN FRANCISCO EXAMINER, RAUL RAMIREZ
and LOWELL BERGMAN,
Respondents.

PETITIONERS' REPLY BRIEF

CHARLES O. MORGAN, JR.
450 Sansome Street
Suite 1310
San Francisco, CA 94111-3382
Telephone: (415) 392-2037
Counsel for Petitioners

STEVEN ALAN REISS
40 Washington Square South
New York, N.Y. 10012
Telephone: (212) 598-3423
Of Counsel

April 24, 1987

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F. CA 94103 • (415) 864-2300

No. 86-1336

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

FRANK MCCOY, EDWARD ERDELATZ and PIERRE MERLE,
Petitioners,

vs.

THE HEARST CORPORATION, A California Corporation,
SAN FRANCISCO EXAMINER, RAUL RAMIREZ
and LOWELL BERGMAN,
Respondents.

PETITIONERS' REPLY BRIEF

Both briefs in opposition apparently recognize that the issue raised by petitioners is indeed worthy of the Court's attention (Hearst Corp. Br. at 2; Ramirez-Bergman Br. at 22-23). This recognition is especially appropriate given the D.C. Circuit's recent *en banc* decision in *Tavoulareas v. Piro,* No. 83-1604 (C.A.D.C. March 13, 1987), where that court resolved in the affirmative the question whether, under *Bose,* an appellate court must view the evidence in the light most favorable to the plaintiff.

Respondents argue, however, that this case does not appropriately present the issue for two reasons. First, despite the California Supreme Court's clear insistence that it was "not bound to consider the evidence of actual malice in the light most favorable to [petitioners] or to draw all permissible inferences in favor of [petitioners]," (Pet., App.A at A-9), respondents contend that "the California court did not disregard the jury's resolution of purely factual questions, nor did it draw any inferences of its own." (Hearst Br. at 11 n.12; see Ramirez-Bergman Br. at 10).

Second, and somewhat inconsistently, respondents argue that if the California Supreme Court did reject jury findings, make its own credibility determinations and draw its own inferences from the evidence, it was justified in doing so because "petitioners' principal evidence, the testimony of Thomas Porter, was offered only in the form of deposition and affidavits." (Ramirez-Bergman Br. at 8; see Hearst Br. at 7-9).

With respect to respondents' first objection, the most obvious refutation is that when, after full briefing on the issue, the Court of Appeals below conducted its *Bose* review viewing the evidence in the light most favorable to the petitioners, it found that the case presented a "textbook case of libel." (Pet., App.B at B-38). Indeed, the California Supreme Court's holding that it was "not bound to consider the evidence of actual malice in the light most favorable to [petitioners] or to draw all permissible inferences in favor of [petitioners]," was a direct response to the mode of *Bose* review employed by the Court of Appeals, which expressly drew all inferences in petitioners' favor and resolved all questions of credibility on their behalf. (Pet., App.B at B-5). Beyond this, however, and without purporting to be exhaustive, there are a number of instances in which the California Supreme Court clearly did not view evidence favorable to the petitioners in a favorable light. For example:

(1) John Manning, the Indiana attorney enlisted by Bergman to obtain Porter's affidavit, conveyed his serious doubts about the veracity of the affidavit to Bergman. The Court of Appeals rightly viewed this as powerful evidence of actual malice. (Pet., App.B at B-13-14). The California Supreme Court, however, took a quite contrary view of the significance of Manning's warnings. It accepted, at face value, Bergman's testimony that he viewed Manning's comments as going only to "the lack of weight the testimony of Porter, a convict, would have in a legal proceeding." (Pet., App.A at A-16-17; 36). Thus, in direct opposition to the standard employed by the Courts of Appeal for the District of Columbia and Ninth Circuits and several state Supreme Courts, the California Supreme Court viewed this evidence most favorably to the *defen-*

dant-respondents rather to the petitioners. Moreover, in doing so, the court necessarily credited Bergman, a witness the jury could rightly have found to lack credibility. See Pet. at 12.

(2) During their only face to face meeting, Porter told Bergman that he had not been threatened by the police. Porter's allegations that he was beaten by officers McCoy and Erdelatz were made *for the first time* in the affidavit secured by Manning. Although Manning conveyed his doubts about the affidavit to Bergman, and Bergman and Ramirez admitted they had doubts about the truthfulness of at least some portions of the affidavit, these allegations were published wholesale without a single thread of corroboration. (Pet., App.A at A-65-66). The Court of Appeals rightly viewed this as substantial evidence of actual malice. (Pet., App.B at B-15-16). The California Supreme Court simply ignored this evidence.

(3) Ramirez and his city editor, William Burkhardt, knew that Erdelatz and McCoy were considered good police officers. They had even been told this by Richard Lee's attorney. Despite this, and despite their awareness that the articles would seriously damage the officers' reputations, respondents published the uncorroborated allegations in Porter's affidavit. Again, the Court of Appeals rightly viewed this as meaningful evidence of acutal malice. (Pet., App.B at B-14). Again the California Supreme Court ignored this evidence.

With respect to respondents' second objection, it is clear that the California Supreme Court did far more than simply put its own gloss on Porter's affidavit testimony. None of the items discussed above involve the interpretation of Porter's testimony. Moreover, respondents do not explain why the fact that *Porter's* testimony was in affidavit form should allow the California Supreme Court to draw its own conclusions about *Bergman's* credibility. The California Supreme Court fully credited Bergman's testimony concerning the significance of Manning's warning concerning the defamatory allegations in Porter's affidavit. It also credited Bergman's testimony that his promise to Porter that he was "going to

bat in a full scale way" for Porter did not mean helping Porter with his detainer. (Pet., App.A at A-18). The jury, however, viewing Bergman in the flesh, was fully entitled to reject these assertions.[1]

In short, this case presents a timely and well-tailored vehicle for deciding the question presented. As Chief Judge Wald observed in *Tavoulareas v. Piro, supra,* when it comes to the question "of what is a proper application of *Bose* to the record . . . we badly need to clarify the appropriate role of a reviewing court in this volatile area of the law . . . " ____ F.2d ____, ____, No. 83-1604 (D.C.Cir. March 13, 1987) (en banc) (Wald, C.J., concurring), Slip. Op. at 5.

DATED: April 24, 1987.

Respectfully Submitted,

CHARLES O. MORGAN, JR.
Counsel for Petitioner

STEVEN ALAN REISS
Of Counsel

---

[1] Respondents have made much of the "testimony" of "eyewitnesses" May Tom and Weyman Tso. These "eyewitnesses" never testified at trial. Their "testimony" was presented purely in hearsay form. It was not presented for the truth, but only as bearing on respondents' state of mind.